IN THE

Supreme Court of the United States

October Term, 1961.

No. 2[illegible].

ELLERMAN LINES, LTD.

and

THE CITY LINE, LTD.,

Petitioners,

v.

LEIGHTON BEARD,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

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OPINIONS BELOW.

The District Court denied petitioners' motions for judgment n.o.v. or for new trial by an order without opinion. The opinion of the Court of Appeals for the Third Circuit is reported in 289 F. 2d 201. A petition for rehearing was denied May 31, 1961, without an opinion.

JURISDICTION.

It is not disputed that there is jurisdiction under Title 28, U. S. C., Section 1254(1).

QUESTIONS PRESENTED.

1. The decision of the court below affirming the finding of the jury in favor of the respondent against the shipowner on the grounds of negligence does not rest upon any principle of vicarious liability, is not in conflict with decisions of other appellate courts, nor does it depart from well recognized rules of liability settled by this Court.

2. The respondent's right to recover for unseaworthiness, as found in his favor by the jury, is justified under the evidence although the Court of Appeals did not pass upon it.

3. The shipowners' attempt to collaterally attack the doctrine of unseaworthiness as applied to longshoremen by challenging the accuracy of this Court's repeated statement that the work of loading and unloading cargo was formerly done by the ship's crew crumbles before the abundant weight of authority which supports that pronouncement.

STATEMENT OF THE CASE.

On July 1, 1955, bales of gunnies which had been stowed in the No. 1 hold aboard the S. S. "City of Calcutta" in India were being discharged in the Port of Philadelphia. The bales had been stowed tightly in tiers across the entire lower hold. In the forward end 63 tons of the bales were consigned to New York (N. T. 814). By reason of the configuration of the bow of the vessel these bales extended out halfway into the square of the hatch. Stowed immediately next to these bales, to the same height (N. T. 118-119), and filling out the rest of the hold, were 100 tons of bales for discharge in Philadelphia (N. T. 777). The individual bales weighed in the neighborhood of 1100 lbs. and measured 4′ x 3′ x 2′ (N. T. 20). Each bale contained 30 to 40 bolts of burlap enclosed in a burlap covering (N. T. 759) and were compressed and banded by four parallel 1″ wide steel bands.

Because of the size, weight and character of the cargo, regular baling hooks could not practicably be used to move this chargo into slings (N. T. 207, 593, 594, 861-863, 906-907). The established method of discharging them in the Port of Philadelphia and other ports in the United States was by means of specially designed flat hooks attached to six lengths of Manila rope in turn affixed to a ring that fit into the shackle which joined the runners of the port and starboard winches (N. T. 167, 321, 331-333, 405, 557, 614, 758, 852-853). Two of these hooks were inserted under different bands on each of three bales and the three bales removed simultaneously as a draft (N. T. 28). The bands in this way served as slings (N. T. 868, 869-870). While the drafts were hoisted out of the hold the longshoremen sought cover underneath the next deck in the wings (N. T. 33, 49). Several hours after the discharge operation had commenced, and after several tiers of the Philadelphia bales had been removed, one of the bales being hoisted out of the hold dropped from the level of the main deck down into the lower hold when its bands broke. In falling the bale glanced off the "New York" stowage and bounded across the hold and pinned the plaintiff against the after bulkhead, causing him to suffer severe injuries (N. T. 122, 201-202, 284-285).

When the entire cargo consists of bales consigned to one port the practice is to remove one tier at a time, leaving a more or less level surface at all times. If a bale drops on such a surface it rolls but a few feet away from where it lands (N. T. 793-794). In the instant case the caroming bale rolled more than 25 feet (N. T. 233).

While the longshoremen were engaged in discharging the bales in this manner, the chief mate advised one of the stevedore bosses that the "hook and band" method was a dangerous one (N. T. 496-497). He informed him that the natives in India loaded the cargo by means of rope slings. Sometime later, howbeit before the accident, he also complained about the fact that the bales were being discharged

too fast and dangerously (N. T. 499). Nonetheless, although he was the officer in charge, at no time did he issue any directions or attempt to take any action to discontinue or change the method or manner of discharge. This, notwithstanding the fact that he was responsible for the safety of personnel engaged in cargo operations, and that his authority outranked the stevedore boss (N. T. 411, 413). The vessel had been in the Port of Philadelphia on previous occasions with the same type of cargo. The identical system of discharge had been used by the stevedores. This was known to and acknowledged to be the fact by the chief mate (N. T. 478).

At the conclusion of the trial the jury answered several interrogatories. Among them were the following: (1) Was unseaworthiness a substantial factor in causing the injuries to the plaintiff? Answer—yes. (2) Was the negligence on the part of Ellerman Lines, Ltd., a substantial factor in causing the injuries to the plaintiff? Answer—yes.

Judgment was entered upon the verdict in favor of the plaintiff against the original defendant. Motions for judgment n.o.v. and for a new trial were denied. This action was affirmed on appeal. Thereafter a petition for a rehearing was denied.

REASONS WHY THE PETITION SHOULD BE DENIED.

I. Respondent's Right to Recover Is Not Based Upon Any Theory of Vicarious Liability as Represented by Petitioners.

It is difficult to recognize a relation between the questions presented by petitioners to this Court and the facts involved in the case or to the legal issues argued in the court below. This case was neither tried nor argued upon any theory of liability of the shipowner brought about by negligent acts of the longshoremen. The propositions developed by the respondent at the trial were these: (a) the

shipowner's liability for the unseaworthy condition of the bindings around the bale of gunnies which broke while the bands were used as an instrumentality to discharge the bale with petitioners' full knowledge and apparent consent; (b) the shipowner's liability in creating an unsafe place to work for the longshoremen by splitting the stow of the bales in the lower hold into consignments to different ports, thereby depriving the longshoremen of any safe cover in the wings in the event of falling objects; (c) petitioners' failure to take any effective steps to forbid the discharge of cargo by a method, and in a manner, which the chief officer recognized as dangerous.

The Court of Appeals treated these theories of recovery as follows. As to the first: "The opinion makes it unnecessary for us to pass upon the issue of unseaworthiness . . . that the cargo in the instant case was 'unseaworthy' by reason of the 'inadequacy' of the steel bands used to bind the burlap bales" (Opinion appended to Petition, p. 15a). As to the second: ". . . there was testimony that those engaged in the task of discharging the bales were exposed to a hazardous situation, by virtue of the stowage of the New York bales with respect to the bales which were being unloaded, and thus were not afforded a 'safe place to work,' which is, of course, negligence on the part of those responsible" (Ibid. Opinion, p. 10a). As to the third: "On the score of Quinn's (the chief mate's) testimony his failure to take effective measures to stop the use of the discharge method which he condemned as 'dangerous' would constitute negligent conduct for which Ellerman was liable in the event of a jury finding that the discharging procedure was in fact 'dangerous,' as he deemed it to be" (Id. Opinion, 9a).

The defect in the bands was not apparent to the longshoremen, nor did they have the opportunity to inspect the bales in the discharge operation as did the petitioners when the cargo was taken on board. The split stowage was created by the petitioners, and the failure to act in the light

of an appreciated danger was the negligent omission of the petitioners' agent. In no instance did respondent seek recovery against the petitioners on any basis of "vicarious liability."

II. There Is No Conflict Among the Circuits That a Shipowner Is Responsible for the Safety of Longshoremen Engaged in Discharging Cargo Nor in Permitting a Method of Discharge to Be Used After Notice and Knowledge That It Is Dangerous.

The Court of Appeals did not pass upon respondent's right to recover for unseaworthiness because it considered it unnecessary in view of the fact that "the record affords ample basis for the jury's finding that Ellerman was negligent" (Id. Opinion, p. 9a). Nonetheless, three of the four cases cited by petitioners to demonstrate that a conflict of decisions exists between the various appellate courts involve the application of the doctrine of unseaworthiness and do not concern the liability of a shipowner for negligence.

In *Arena v. Luckenbach Steamship Co.*, (C. A. 1, 1960) 279 F. 2d 186, cert. denied 364 U. S. 895, a longshoreman was injured because his fellow workers neglected to fasten nets over rolls of paper being hoisted onto the vessel on board trays furnished by the stevedore. The issue was one of alleged unseaworthiness and not negligence.

In *Royal Mail Lines, Ltd. v. Peck*, (C. A. 9, 1959) 269 F. 2d 857, a longshoreman working in the hold unloading newsprint was struck by part of the unloading gear lowered into the ship's hold by a shore crane that belonged to the stevedore in response to signals of a fellow worker. There was no evidence that the ship's officers were aware of any defective working condition of the crane. The decision turned on the application of the doctrine of unseaworthiness.

In *Blankenship v. Ellerman's Wilson Line*, (C. A. 4, 1959) 265 F. 2d 455, a carpenter nailing a timber to the wall of a hold was injured when a draft of boards struck the

scaffold upon which he was standing and dislodged it, causing him to fall into the hold. The sole issue presented to the jury was the liability of the shipowner for the breach of the warranty of unseaworthiness.

In none of the foregoing situations were the ship's officers aware of the existence of any dangerous or defective condition, and consequently the liability of the shipowner depended upon the breach of the warranty of unseaworthiness.

The only cited case involving the shipowner's liability for negligence arising out of failure to supervise the stevedoring operation is *Berti v. Compagnie De Navigation Cyprien Fabre*, (C. A. 2, 1954) 213 F. 2d 397. There, a longshoreman standing on hatch covers to give signals to the winchman was precipitated into the hold when the winch cable displaced an unsecured hatch beam. There was no evidence that two crew members who were watching the stowage and checking for pilferage were concerned with the manner in which the cargo was handled or were aware of any danger.

Contrast this factual situation with the instant case. Here the officer in charge of the cargo operations watched the manner and method of discharging the cargo, complained that it was dangerous, but took no action to change or forbid it.

The decision of the Court of Appeals is not in conflict with decisions of this Court. We refer to the statement in *N. Y. & N. J. S. H. Pilot's Assn. v. Halecki*, 358 U. S. 613, 618-619 (1959):

> "As to the claim based upon negligence . . . we agree with the Court of Appeals that 'the evidence created an issue that could be decided only by a verdict.' The defendants owed a duty of exercising reasonable care for the safety of the decedent. They were charged with knowledge that carbon tetrachloride was to be used in the confined spaces of the engine room. It was for the triers of fact to determine

whether the defendants were *responsibly negligent in permitting* or authorizing *the method or manner of its use.*"

III. Other Findings Besides the Assigned Reasons Render a Review Moot.

Petitioners wholly ignore the affirmance of the jury's finding of negligence based upon an unsafe place to work. The fact is undisputed that the bales stowed on board petitioners' vessel, according to the ship's cargo stowage plan, created a split stow between the Philadelphia and New York cargo. As a consequence, while the Philadelphia bales were being discharged, the remainder of the bales, originally stowed to the same height, afforded a surface against which a falling object could carom off and roll to any part of the hold. Thus, the respondent, who had retreated as far away from the hatch opening as he could, nonetheless was struck and pinned against the after bulkhead. This could not have happened had the bales been discharged tier by tier across the hold.

This stowage was solely the undertaking and responsibility of the petitioners. It was a proximate cause of respondent's injuries. It resulted from the petitioners' failure to furnish the respondent with a safe place to work (Id. Opinion, 10a). Upon such an established rule there is no conflict among our appellate courts. The petitioners have not chosen to request a review of this aspect of the case, thus rendering moot any final determination by this Court upon the assigned reasons for review.

Despite the Fact That the Court of Appeals Did Not Pass Upon the Right to Recover for Unseaworthiness, That Finding by the Jury Was Justified Under the Evidence.

The record in this case is replete with evidence that it had been the established practice in the Port of Philadel-

phia and most ports of the United States to use special hooks fitted under the bands of the bale to hoist the large bales of gunnies out of the holds of vessels. No other method had been in use, or could be practicably employed, without damaging the bolts of material packed inside the burlap covering and imposing an oppressive physical burden upon the longshoremen. The parting of the bands used under these circumstances, without any additional facts, would clearly render the shipowner liable under the doctrine of unseaworthiness. But, in this case we have the additional facts that petitioners knew and expected the bands to be used for this purpose. The ship's personnel had witnessed this system on numerous previous occasions, not only with respect to such cargo discharged from the S. S. "City of Calcutta," but also from other vessels of its fleet.

In this operation the bands served as slings to secure the hooks and carry the weight of the bales. The hooks were designed for this purpose and could not otherwise be used. When bales were hoisted out of the hold by this method it was extremely rare for any of the one-inch steel bands to break. Two bands in proper condition provided a margin of safety several times the weight of the bale. In the opinion of an expert, and from a reasonable inference as to the manner and circumstances under which the accident occurred, the bands in the instant case broke because they were defective.

In *Crumady v. "Joachim Hendrik Fisser,"* 358 U. S. 423, 3 L. ed. 413, 79 S. Ct. 445, this Court found that a safety device on a winch which was not set at a proper limit rendered it unsafe and dangerous for the work at hand, stating (U. S. 427-428):

> "The case is no different in principle from loading or unloading cargo with cable or rope lacking the test strength for the weight of the freight to be moved. In that case the cable or rope . . . makes the vessel pro tanto unseaworthy."

In the instant case unloading the cargo by means of the steel bands which lacked the test strength for the weight of the freight to be moved likewise made the vessel pro tanto unseaworthy. The fact that the Court of Appeals found it unnecessary to pass upon this ground of recovery attests to the fact that it deemed it redundant and not that it lacked merit or would not support the respondent's judgment.

Notwithstanding this, petitioners have argued at length such a finding cannot be justified. This contention is made wholly in the abstract. At no place do petitioners acknowledge the indisputable fact that the bands in this case were used as cargo slings. The reason is obvious. To do so is to establish the shipowners' liability for their "seaworthy" condition. Nor do the shipowners admit the use of the bands for this purpose was part of an established and widely accepted method for discharging the bales with which they were familiar and expected to be used in the instant case. Indeed, this system served the petitioners' interests. Under the evidence the cargo could not otherwise be practicably discharged with the result that the transportation of the cargo from India would have been without meaning or profit. It was the petitioners' duty, knowing the cargo was to be so handled, to see to it that the bands were adequate when the cargo was put aboard in India where it was subject to proper inspection. This obligation the shipowner had to discharge to avoid liability for negligence. But, if such an inspection failed to disclose an internal weakness, and the bands broke when used as part of the gear to discharge the bales, the situation was no different or more adverse to the shipowner than his liability for the defective rope in *Mahnich v. Southern S. S. Co.*, 321 U. S. 96 (1944), or the defective shackle in *Seas Shipping Co. v. Sieracki*, 328 U. S. 85 (1946). Furthermore, the shipowner is not without recourse. He can adjust his rates for the carriage of cargo which presents risks and problems in handling, and by so doing influence the size and packaging of the cargo.

The Historical Background Firmly Supports This Court's Statements That the Loading and Unloading of Cargo Was Work Formerly Done by the Crew.

In addition to avoiding any reference to the factual basis for the finding of the jury in favor of the respondent, the petitioners have attacked the accuracy of the oft-repeated statements of this Court that the work of loading and unloading cargo was formerly performed by members of the crew. In so doing the petitioners have ignored or overlooked the authoritative source material, which stretches back to antiquity, relating to the role played by crew members in the handling of the cargo. This historical background firmly supports the observations made by this Court.

The maritime law, as we know it today, developed as part of the law merchant in the mercantile centers of the Mediterranean. As time progressed, Maritime codes were promulgated in various Mediterranean ports. The most famous of these are "The Tablets of Amalfi"[1] and "Llibre del Consolat de mar of Barcelona".[2] As trade and exploration advanced, ports along the French coast and in the Baltic Sea area rose to prominence and, in turn, promulgated their own maritime codes. Among these are "The Laws

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1. 4 Black Book of the Admiralty 3 (Twiss ed. 1876). "The extant manuscript dates from the sixteenth century, but Senigallia says that the weight of authority would trace that part of it which is in Italian back to the fourteenth century, and the Latin part to a time prior to 1131." Gilmore and Black, *op. cit. supra* note 2, page 5, footnote 14.

2. Printed *sub nom.* "The Good Customs of the Sea" in 3 Black Book of the Admiralty 50 (Twiss ed. 1874). This code was first printed circa 1484, but probably took on definite shape some two centuries earlier. Gilmore and Black, *op. cit. supra* note 2, page 5, footnote 15.

of Oleron",[3] "The Laws of Wisby",[4] and "The Laws of the Hanse Towns".[5]

Under these various maritime codes there is no question but that the work of loading and unloading the ship, and all other work of the ship for that matter, was done by the crew. Perhaps the best expression of this appears in Chapter 110 of the "Llibre del Consolat de mar Barcelona",[6] where, in setting forth the obligations of the mariner, it is stated:

> "Further, the mariner is bound in all things that pertain to the ship, to go to the forest and fetch wood, to saw and to make planks, to make spars and ropes, to bake, to man the boat with the boatswain, *to stow goods and to unstow them;* and at every hour when the mate shall order him to go and fetch water, and to put on board all the victuals of the merchants, to heave the vessel over, to go and fetch spars and ropes, to carry planks, and to aid to repair the vessel, and he is bound to everything to improve the condition of the ship and all which belongs to the ship while he shall be engaged to the ship." (Emphasis supplied.)

Similarly, both "The Laws of Wisby"[7] and the "Laws of Oleron",[8] disclose that the work of loading and unloading cargo was done by the crew. *Thus, a member of the crew could not leave the ship at the termination of a voyage until after the cargo was discharged.*[9] For assisting in

3. 30 Fed. Cas. 1171. The laws of Oleron were formulated during the 13th and 14th centuries. 3 Wigmore, A Panorama of the World's Legal Systems, Chap. 13 (1928), reprinted in Morrison and Stumberg, Cases and Materials on Admiralty 1, 5 (1954).

4. 30 Fed. Cas. 1189. First promulgated during 13th century and perhaps at an even earlier date. *Ibid.*

5. 30 Fed. Cas. 1197. First promulgated in the year 1597, *Ibid.*

6. 3 Black Book of the Admiralty 219 (Twiss ed. 1875).

7. 30 Fed. Cas. 1189.

8. 30 Fed. Cas. 1171.

9. "The Laws of Wisby", Art. LIV.

cargo operations, the crew was paid at specified rates,[10] and if the cargo was damaged in the course of stowing it, there were provisions making the mariners liable for the loss.[11] Such detailed regulations leave little doubt but that the members of the crew customarily loaded and unloaded the cargo.

English and American Authorities.

The English Law is likewise clear on the crew's obligation to assist in the loading and discharging of cargo. In "The Law Relating to Shipmasters and Seamen", by Joseph Kay, Esq. (London 1894, 2nd ed.), the author states in section 468, pp. 332, 333:

> "It is the duty of the seamen to bring to their work competent skill and knowledge, and to use under all the circumstances, their utmost exertions to preserve both ship and cargo; to assist in the *stowage and delivery of the latter at the several ports* to which the voyage described in the article extends; to help in mooring the former and to *stay by her until the cargo be actually delivered*, or until they are legally discharged, unless compelled by illness to be before either of these events has happened. They are bound in short, during the continuance of their contract to devote their whole time to the service of their employers."

The obligation to assist in handling cargo actually was incorporated in the ship's articles. In "Laws of the Sea" by Frederick J. Jacobsen (Baltimore 1818), the author states on p. 134:

> "The English ship's articles, which, like the Prussian, are a private agreement, besides similar provisions, contain the stipulation, that an unauthorized ab-

10. "The Laws of Wisby", Art. VXLVIII.

11. "The Laws of Wisby", Art. XLIX; "The Laws of Oleron", Art. XXVII.

> sence of 24 hours shall be tantamount to desertion, that every lawful order of the commander of the vessel, for effectual government thereof, tending to suppress immoralities and vices of every description, may be enforced, under penalty of forfeiture of all the wages, and all the property on board of such refractory seaman; that every mariner is responsible at the return of the vessel, for inventory of articles entrusted to him; that he is not to sleep on shore; *but during the day he is to be engaged in the discharge of the cargo,* and at night ready for any watch duty which the Master may designate; . . . " (Emphasis supplied.)

In *Dixon v. The Cyrus,* (D. Pa., 1789) 7 Fed. Cas. 755, Case No. 3,930, the wages of crew members were sought to be forfeited because they left the vessel before the cargo had been fully discharged. Said the court at p. 757:

> ". . . there can be no doubt but that the general maritime law, and the tenor of most, if not all shipping articles, requires that the mariner shall stay by the ship until her cargo is safely landed, under the penalty of forfeiting all the fruits of his preceding labour, if he wilfully and disobediently abandons his duty in this particular. But if the owner or *captain,* as is frequently the case, *shall find it more for his interest to hire men* on daily pay *to unload the ship,* than to keep the crew under monthly wages, and find them with provisions in port, *he may certainly release the mariner from this part of his duty.*" (Emphasis supplied.)

A similar provision requiring the crew to assist in cargo operations received judicial consideration in *Cloutman v. Tunison.*[12] The opinion was delivered by Judge Story and so forcefully does it dispose of the suggestion that the loading and discharging of cargo was not the work of the ship's crew that an extended discussion is warranted.

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12. 5 Fed. Cas. 1091 (Cir. Court, D. Mass. 1833).

Tunison signed on a ship as second mate for a foreign voyage. At the completion of the voyage, the ship returned to Boston, Massachusetts, where her cargo was discharged. Shortly after the vessel reached Boston and before her cargo was discharged, Tunison left the ship and did not return for five days. When he sought to claim his wages, the shipowner refused to pay him, contending that in leaving before the cargo was discharged, Tunison was a deserter and had forfeited his wages.

The court held that Tunison was not a deserter because the voyage had terminated when the vessel reached port safely. However, Tunison was guilty of a "criminal disobedience" in leaving the ship before the cargo was discharged in violation of his duties and for this the court decreed a forfeiture of two months' wages. In the course of a lengthy opinion, the court made it quite clear that under the maritime law the crew was obligated to load and discharge cargo. Judge Story stated, at p. 1093:

> "Now, when is the voyage ended, in the sense of the maritime law? I answer, when the ship has arrived at her last port of destination, and is moored in good safety in the proper and accustomed place. I do not say, that the officers or seamen are then discharged from any farther duty, and are not bound to attend to the unlivery of the cargo. On the contrary, *I maintain, that the seamen, and a fortiori the officers are bound to remain by the ship, and watch over her concerns, and assist in the unlivery of the cargo*, if made in a seasonable time; unless there be some express or implied agreement, or established usage, to dispense with their farther services. There is a clause in the common ship articles, pointed to this very duty. 'And whereas' (says the clause) 'it is customary for the officers and seamen, on the vessel's return home, in the harbour, and whilst to sleep, greatly to the prej-

udice of such vessel and freighters, be it further agreed by the said parties, that neither officer nor seaman shall, on any pretense whatever, be entitled to such indulgence; *but shall do their duty by day in discharging the cargo,* and keep such watch by night as the master shall think proper to order for the preservation of the same.' And this very stipulation is in the present articles, and constitutes (sic) a part of the contract." (Emphasis supplied.)

Judge Story also quoted from English authorities supporting this position, at pp. 1093-94:

"Nor is there any thing novel in this doctrine. It is manifestly implied in the reasoning of that truly great Judge, 'princeps inter pares', Lord Stowell, in the case of 'The Pearl', 5 C. Rob. Adm. 224, which has been cited at the bar. But it is still more directly announced in the more recent case of 'The Baltic Merchant', Edw. Adm. 86. In this latter case, which turned upon the very point, whether the voyage was ended by a mere arrival in port, Lord Stowell on that occasion said: 'By interpretation of law, the voyage is not completed by the mere act of arrival. The act of mooring is an act to be done by the crew; and their duty extends to the time of the unlivery of the cargo. There is no period at which the cargo is more exposed to hazard, than when it is in the act of being transferred from the ship to the shore; and therefore the law, not only the old law, but particularly the statute, by which the West India trade has been in later times regulated,' (and the case before him was of a West India ship), 'has enjoined in the strictest manner, that the mariners shall stay by the vessel, until the cargo is actually delivered. I take this to have been always a part of the duty of the mariners, on account of the noncompletion of the contract. This is a consideration

not in modum poenae, but it is a civil compensation for the injury received, existing in all reason and justice antecedently to any statute upon the subject.' "

Cloutman v. Tunison remained both the law and the practice throughout the remainder of the 19th Century. In *The Hudson*[13] the Court sustained the shipowner's right to make a deduction from the wages of a seaman who failed to assist in discharging the cargo, stating:

> "The amount in controversy here is small, but to the libellants who sue for their wages, the matter is of consequence. Moreover, the principle involved is important. The case, therefore, deserves and has received careful consideration. The better opinion seems to be that unless there is some express or implied agreement or established usage to dispense with their further services, seamen are bound to remain with the ship upon the completion of the voyage and *assist in the delivery of her cargo,* if made in a reasonable time. 1 Conk. Adm. 131; *Dixon v. The Cyrus*, 2 Pet Adm. 413; *Cloutman v. Tunison*, 1 Sumn. 377."

Even when the practice of utilizing stevedoring contractors to handle the cargo became quite prevalent during the latter part of the 19th Century, the crew frequently was called upon to perform this work. In *Clowes v. The Frank and Willie*,[14] libellant, a member of the ship's crew, suffered a broken leg while helping to discharge a cargo of lumber from the ship. He sued for damages and the court found in his favor, holding that the respondent had failed to provide him with a safe place in which to work. It is significant that but twelve years later, in *The Osceola*,[15]

13. 6 Fed. 830 (W. D. Pa. 1881).
14. 45 Fed. 494 (S. D. N. Y. 1891).
15. 189 U. S. 159 (1903).

this Court remarked that recovery in *The Frank and Willie* actually was predicated upon *unseaworthiness rather than negligence.*

In *The Circassian,* 1 Ben. 209, Fed. Cas. No. 2,722 (1867), Judge Benedict stated:

> *"I confess that I have never been able to see any sound distinction between the nature of the services performed in stowing and breaking out the cargo of a ship, and the services performed in its transportation.* The stowage and the landing of the cargo form a necessary part of the contract of affreightment. Without the performance of this duty no freight can be earned. The safety of the ship and of the cargo depends in a great measure upon the care and skill displayed in the performance of this duty, and for its nonperformance in a proper manner the ship is liable in the admiralty. It is a service which, when performed by the crew, as is frequently the case, is considered a maritime service, and compensated in the admiralty under the name of wages. And when not performed by the crew, it devolves upon a class as clearly identified with maritime affairs as are the mariners, and fitted for the duty by a special and peculiar experience."

In *The Canada,* 7 Fed. 119 (1881), stevedores who unloaded the vessel sought to assert a maritime lien against the ship for wages. The court held that the stevedores like members of the crew were entitled to such a maritime lien and quoted with approval the above excerpt of Judge Benedict in *The Circassian* indicating that there is no "sound distinction between the nature of the services performed in stowing and breaking out the cargo of a ship and the services performed in its transportation." The court then concluded in *The Canada* as follows:

> ". . . It is very plain that the services of a stevedore are maritime in nature. A voyage is not begun or ended without the stowing or discharge of cargo. To

receive and deliver the cargo is as much a part of the undertaking of the ship as its transportation from one port to another. Indeed, it is an essential part of such transportation. Freight is not due or earned until the cargo is, at least, placed on the wharf at the end of the ship's tackle . . ."

In the *Gilbert Knapp*, 37 Fed. 209 (1889) where the court was also involved with a question of the existence of a lien for maritime services, the court stated specifically (at p. 210) that the service of a stevedore in loading or discharging cargo:

". . . *was formerly done by and as part of the duties of mariners. The necessities of a developed and swelling commerce have superseded old methods, and have substituted a trained and skilled body of laborers, with a view to safe storage and prompt delivery of cargo, and the speedy dispatch of the ship.* The service is essential to enable the ship to earn freight,—the sole object for which the ship is constructed and navigated. The contract of affreightment is confessedly maritime. Why are not services performed in fulfillment of the maritime contract equally maritime? The lading of the vessel or delivery of cargo upon the wharf is as essential an element of the contract as the carriage by sea. Freight cannot be earned without delivery. *Ex parte Easton*, 95 U. S. 76. It is well said by Mr. Benedict (Ben. Adm. § 285) that delivery is the 'crowning act of maritime commerce, for which all others labor, and to which all other acts are subordinate, on which the right to freight depends, and which is in fact the great purpose, and the only ultimate purpose, of a ship.' All acts, therefore, proper to be done in fulfillment of maritime contracts, must be of a maritime nature, because done with respect to 'things pertaining to the sea', and constituting part of the service contemplated by the maritime contract. They 'have reference to

maritime service and to maritime transactions.' They are services 'touching rights and duties appertaining to commerce and navigation'. . . ." (Italics added.)

And in *The Seguranca*, 58 Fed. 908 (1893), another case involving the assertion of a *maritime lien* for services rendered to a vessel, the court stated that stevedores and others performing work necessary for the ship to accomplish its mission "*are mere substitutes for seamen, who formerly did, and often still do, the same work, and have a lien therefor.* See *The Mattie May*, 45 Fed. 899, and *The Scotia*, 35 Fed. 916. . . ." (Italics added.)

This Court recognized these concepts in *Atlantic Transport Co. v. Imbrovek*[16] involving a claim for damages brought by a longshoreman who was injured aboard a ship during the course of loading cargo aboard the vessel. There it was stated (at pp. 61-62):

> "The libellant was injured on a ship, lying in navigable waters, and while he was engaged in the performance of a maritime service. We entertain no doubt that the service in loading and stowing a ship's cargo is of this character. Upon its proper performance depends in large measure the safe carrying of the cargo and the safety of the ship itself; and it is a service absolutely necessary to enable the ship to discharge its maritime duty. *Formerly the work was done by the ship's crew; but, owing to the exigencies of increasing commerce and the demand for rapidity and special skill, it has become a specialized service devolving upon a class 'as clearly identified with maritime affairs as are the mariners.'* " (Emphasis supplied.)

In *International Stevedoring Co. v. Haverty*[17] again this Court recognized the fact that longshoremen were performing work which was historically a part of the duties of the crew members.

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16. 234 U. S. 52 (1913).
17. 272 U. S. 50 (1926) at page 52.

"It is true that for most purposes, as the word is commonly used, stevedores are not 'seamen'. But words are flexible. *The work upon which the plaintiff was engaged was a maritime service formerly rendered by the ship's crew.* Atlantic Transport Co. v. Imbrovek, 234 U. S. 52, 62, 58 L. Ed. 1208, 1212, 51 L. R. A. (N. S.) 1157, 34 Sup. Ct. Rep. 733. *We cannot believe that Congress willingly would have allowed the protection to men engaged upon the same maritime duties to vary with the accident of their being employed by a stevedore rather than by the ship.* The policy of the statute is directed to the safety of the men and to treating compensation for injuries to them as properly part of the cost of the business. If they should be protected *in the one case, they should be in the other.* In view of the broad field in which Congress has disapproved and changed the rule introduced into the common law within less than a century, *we are of opinion that a wider scope should be given to the words of the act, and that in this statute "seamen" is to be taken to include stevedores employed in maritime work on navigable water, as the plaintiff was, whatever it might mean in laws of a different kind.*" (Emphasis supplied.)

The foregoing two cases led inexorably to the decision in *Seas Shipping Company v. Sieracki*,[18] which held that men engaged in loading or unloading a vessel were performing a maritime service that traditionally had been done by the ship's crew, and accordingly were entitled to the benefits of the warranty of seaworthiness. The Court stated:

"Obviously, the norm of the liability has been historically and still is the case of a seaman under contract with the vessel's owner. This is because the work of maritime service has been done largely by such persons. But it does not follow necessarily from this fact that

18. 328 U. S. 96 (1946).

the liability either arose exclusively from the existence of a contractual relation or is confined to situations in which one exists.

* * * *

"Because rationalizing the liability as one attached by law to the relation of shipowner and seaman, where this results from contract, may have been thought useful to negative the importation of those commonlaw tort limitations does not mean, however, that the liability is itself contractual or that it may not extend to situations where the ship's work is done by others not in such an immediate relation of employment to the owner. That the liability may not be either so founded or so limited would seem indicated by the stress the cases uniformly place upon its relation, both in character and in scope, to the hazards of marine service which unseaworthiness places on the men who perform it. These, together with their helplessness to ward off such perils and the harshness of forcing them to shoulder alone the resulting personal disability and loss, have been thought to justify and to require putting their burden, in so far as it is measurable in money, upon the owner regardless of his fault. Those risks are avoidable by the owner to the extent that they may result from negligence. And beyond this he is in position, as the worker is not, to distribute the loss in the shipping community which receives the service and should bear its costs.

* * *

". . . All the considerations which gave birth to the liability and have shaped its absolute character dictate that the owner should not be free to nullify it by parcelling out his operations to intermediary employers whose sole business is to take over portions of the ship's work or by other devices which would strip the men performing its service of their historic protection. The

risks themselves arise from, and are incident in fact to the service, not merely to the contract pursuant to which it is done. The brunt of loss cast upon the worker and his dependents is the same, and is as inevitable, whether his pay comes directly from the shipowner or only indirectly through another with whom he arranges to have it done . . ."

It is the enlightened rule in the *Sieracki* decision that petitioners would subvert by their collateral attack upon the accuracy of the historical basis of one of the foundations of that decision. For this reason it was deemed necessary to show how wholly unwarranted was this attack. The observations of this Court need no defense. They rest firmly upon a historical foundation of maritime practice rooted in antiquity and followed throughout the centuries to modern times. Withal, this entire argument on the part of the shipowner is inappropriate. The Court of Appeals, as stated heretofore, found it unnecessary to render a decision involving the doctrine of unseaworthiness.

CONCLUSION.

Petitioners' application for writ of certiorari should be denied because: (1) petitioners' liability for negligence does not depend upon any vicarious liability; instead it follows from the failure to furnish respondent with a safe place to work, and the failure of the chief officer of the vessel to forbid or alter a method and manner of discharging cargo which he deemed dangerous; (2) petitioners do not seek review of the former ground, thereby rendering moot any further consideration of this cause; (3) the latter ground is not fairly presented inasmuch as it involves an omission to act upon the part of the ship's officers and is wholly independent of any negligence which might be imputed to the longshoremen; (4) petitioners have failed to show a conflict of decisions exists upon these bases of recovery; (5) despite the fact that the Court of Appeals found

it unnecessary to pass upon the jury's finding in the respondent's favor to recover for unseaworthiness, this was justified under the facts of the case; (6) petitioners' collateral attack upon the historical basis for this Court's assertion that the work of loading and unloading cargo was formerly the work of the ship's crew is wholly irrelevant to the review of the decision of the court below, is entirely without merit, and cannot stand up before the abundant weight of authority which supports that pronouncement.

It is respectfully submitted, therefore, that the petition should be denied.

Respectfully submitted,

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